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Supreme Court of the United States

October Term, 1995

DINH TRUONG TRAN; THE ALPHONSE HOTEL CORP., d/b/a The Carter Hotels; JUDE HOTEL CORP., d/b/a The Hotel Kenmore,

Cross-Petitioners,

vs.

THO DINH TRAN,

Cross-Respondent.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

ALAN H. LICHTENBERG
Counsel of Record
URI SELLA
LICHTENBERG & GINACH, P.C.
Attorneys for Cross-Petitioners
90 Park Avenue
New York, New York 10016
(212) 867-7900

8223
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err in its decision that Cross-Respondent was not required to seek arbitration pursuant to a collective bargaining agreement, before proceeding to file a complaint in a federal court, raising causes of action based on the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) (hereinafter referred to as "FLSA").

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Cross-Respondent's Appendix B at page A3) is reported at 54 F.3d 115 (2d Cir. 1995). The decisions of the United States District Court for the Southern District of New York (Cross-Respondent's Appendix C at page A15, and D at page A31) are reported at 847 F. Supp. 306 (S.D.N.Y. 1993), and at 860 F. Supp. 91 (S.D.N.Y. 1993).

STATEMENT OF JURISDICTION

The date the original petition was docketed is December 29, 1995.

The decision of the United States Court of Appeals for the Second Circuit was rendered on May 5, 1995. On July 19, 1995, the Court of Appeals denied Cross-Respondent's petition for rehearing.

This Court's jurisdiction in this case is pursuant to 28 U.S.C. § 1254 and Rule 12.5 of the Rules of the Supreme Court of the United States, and is conditional upon this Court's grant of Cross-Respondent's petition for a writ of certiorari.

STATEMENT OF THE CASE

A. Preliminary Statement

The issue sought to be raised in this conditional cross-petition is whether Cross-Respondent's (herinafter referred to as "Petitioner") was not required to exhaust his arbitral remedy based on a collective bargaining agreement, prior to filing an action in federal court.

The United States Court of Appeals for the Second Circuit ruled, as part of its opinion in this action, that, with regard to

Petitioner's FLSA claims, Petitioner was not required to exhaust his arbitral remedy based on a collective bargaining agreement, prior to filing an action in federal court.

The Court of Appeals' opinion relied significantly on the doctrine set forth in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981), in which the Supreme Court held that the fact that an employee had unsuccessfully submitted his wage claims against his employer to arbitration pursuant to grievance and arbitration procedure, does not preclude the employee from subsequently pressing his claims in a federal court.

In this conditional cross-petition, the Cross-Petitioners (hereinafter referred to as "Respondents") argue that in the event the Court grants the petition for writ of certiorari, just resolution of the issues presented in the Petition requires the Court to determine whether Petitioner was required to pursue arbitration pursuant to a union contract retaining a mandatory binding arbitrator clause which contract to which both employer and employee are subject, before presenting his FLSA causes of action in federal court.

Respondents will argue that the Court of Appeals erroneously applied the doctrine of *Barrentine* to the facts of this specific case; that subsequent opinions of the Supreme Court have narrowed, if not abolished, the doctrine of *Barrentine*; and that public policy considerations require the Court to reverse the decision of the Court of Appeals, in order to preserve the effect of binding grievance and arbitration clauses in relation to individual labor disputes arising pursuant to federal law, and thus, to avoid a situation in which federal courts will be swamped by unnecessary claims, which could be otherwise easily resolved by arbitrational tribunes.[1]

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1. Respondents do not waive their right to object to each of the claims which are the basis for Petitioner's petition.

B. Statement of Facts

Respondent Dinh Truong Tran is the president of the Respondents Hotel Carter and Hotel Kenmore. Both hotels are members of the Hotel Association of New York City, Inc. (the "Employer").

Petitioner is an immigrant from Vietnam who entered the United States in 1982 under the sponsorship of Respondents. Shortly after his arrival to the United States Petitioner began his employment with Respondents.

As of April 1982, Petitioner became a member of the New York Hotel and Motel Trade Council, AFL-CIO (the "Union").

The Employer and the Union have entered into collective bargaining agreements on march 17, 1981 and, subsequently, on June 26, 1985 (the "CBA). The CBA includes an arbitration clause which provides as follows:

> COMPLAINTS, GRIEVANCES AND ARBITRATION
>
> All complaints, disputes or grievances arising between the parties hereto involving questions or interpretation or application of any clause of this Agreement, or any acts conduct or relations between the parties, directly or indirectly, which shall not have been adjusted by and between the parties involved shall be referred to a permanent umpire to be known as the Impartial Chairman, and his decision shall be final and binding upon the parties hereto. Any such complaint, dispute or grievance involving an Employer member of the Association shall in the first instance, be submitted to the Labor

> Manager who will be appointed and employed by the Association to consider and adjust with a duly accredited representative of the Union, for their joint consideration and adjustment; if they agree such decision shall be binding on the parties hereto. Should the matter not be resolved by the Labor Manager and the representative of the Union, it shall then be referred to the Impartial Chairman as aforesaid.

(*See* Petitioner's Appendix C, at page A19).

According to the allegations in the complaint, Petitioner alleges to have back wages claims against Respondents. Based on those allegations, Petitioner filed a complaint in the Federal District Court for the Southern District of New York. Petitioner did not seek or attempt to resolve his dispute with Respondents through the arbitration clause of the CBA.

Petitioner's causes of action are based on the FLSA, breach of the CBA, and other state and common law claims.[2]

Thus, although Petitioner was aware of the CBA, he did not attempt to resolve the dispute with Defendants through the binding arbitration clause under the CBA, but rather chose to file a complaint against Respondents in a federal court.[3]

C. Summary of the Proceedings in the District Court

Petitioner's complaint was commenced in the District Court

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2. Respondents deny all of Petitioner's allegations in the complaint.

3. The fact that Petitioner was aware of the existence of the CBA at the time he filed the complaint is evident by the fact that the fifth cause of action in the complaint is based on Respondents' alleged breach of the CBA.

on October 10, 1991. Respondents filed an answer with Counterclaims on December 4, 1991.

On July 31, 1992 Petitioner filed an amended complaint, which Respondents answered on December 28, 1992.[4]

On June 1, 1993, Respondents filed a motion for summary judgment to dismiss Petitioner's amended complaint.

On August 17, 1993, the District Court dismissed Petitioner's state and common law causes of action, holding that

> absent the showing that the aggrieved employee has attempted to resort to grievance and arbitration procedures as provided by the collective bargaining agreement, the employee is precluded from instituting a suit in federal court to recover pay and other damages arising out of disputes covered by the agreement.

(*Tran v. Tran*, 847 F. Supp. 303; Petitioner's Appendix at page A40).

The court further instructed the parties to submit briefs addressing the question whether "plaintiff's remaining claims under the FLSA are affected by the arbitration clause contained in the CBAs" (*Tran, supra*; Petitioner's Appendix at page A45).

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4. A substantial part of Petitioner's claim before this Court is that Respondents waived their right for arbitration by failing to raise the arbitration clause as an affirmative defense in their answer to the complaint. However, Petitioner conveniently omits the fact that the arbitration was raised by Respondents as an affirmative defense in their answer to the amended complaint.

Petitioner failed to file a brief responsive to the District Court's Order, and on March 3, 1994, the court held that since Petitioner's FLSA claim "clearly implicates rate of pay issues, the plaintiff was required to exhaust his arbitral remedy prior to filing that claim in this Court" (*Tran v. Tran*, 860 F. Supp. 91; Petitioner's Appendix at page A22).[5]

D. Summary of the Proceedings in the Court of Appeals

The Court of Appeals in its decision dated May 5, 1995 affirmed, in substance, the lower court's order dated August 17, 1993, and reversed the court's order dated March 3, 1994. Thus, the Court of Appeals held that Petitioner was required to exhaust his arbitral remedy under the CBA before bringing his state and common law claims into court, but was not required to pursue arbitration before bringing his FLSA claims into court.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I.

IN THE EVENT THE COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI, JUST RESOLUTION OF THE ISSUES PRESENTED IN THE PETITION REQUIRES THE COURT TO DETERMINE WHETHER PETITIONER WAS NOT REQUIRED TO EXHAUST HIS ARBITRAL REMEDY PRIOR TO FILING HIS COMPLAINT.

The Court of Appeals significantly relied in its opinion on the Supreme Court's Opinion in *Barrentine v. Arkansas-Best*

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5. After the District Court rendered its August 17, 1993 decision, and almost two years after Petitioner filed his complaint, Petitioner finally sought arbitration, which the union then refused to pursue.

Freight System, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981). In applying the doctrine of *Barrentine* to this case, the Court of Appeals erred (a) in its application of the ruling of *Barrentine* to the substantially different facts pertaining to this case; (b) in that it ignored several other opinions of the Supreme Court which significantly narrowed, and perhaps even abolished, the doctrine set forth in *Barrentine*; and (c) in that it did not give effect to public policy considerations which support the enforcement of valid arbitration clauses in the context of labor disputes.

A. Summary of the *Barrentine* Case

Several truck drivers filed grievances with their union pursuant to a collective bargaining agreement charging entitlement to certain compensation from their employer pursuant to the collective bargaining agreement. Their claim was brought before an arbitrator who rejected the claim without any explanation.

Thereafter, the employees filed a complaint in federal court based on the FLSA. In acting so, the employees disregarded the provision of the collective bargaining agreement which provided that the ruling of the arbitrator was "final and binding".

The Supreme Court, in its majority opinion, held that the employees were not barred from filing a complaint in a federal court, by the prior unsuccessful submission of their wage claim to the arbitrator.

The majority opinion, delivered by Justice Brennan, is based on the following premises:

> Two aspects of national labor policy are in tension in this case. The first, reflected in

> statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationship between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures.

(*See Barrentine, supra*, at 734).

Based on the foregoing premises, the Court held that while disputes arising from the collective bargaining agreement are suited for arbitration, "different considerations apply where the employee's claim is based on rights arising out of statue designed to provide minimum substantive guarantees to individual workers" (*Barrentine, supra*, at 737).

The Court stated two reasons why a different treatment should be given to FLSA claims, and to claims arising under the collective bargaining agreement; and why the employees' rights under the FLSA might be lost if submission of their wage claim to an arbitrator, pursuant to a collective bargaining agreement, will preclude them from later bringing a claim in court under the FLSA: (1) the union may not pursue the employee's dispute as a result of conflict of interest between the union and the employee; and (2) the arbitrator in a labor dispute is not as competent as a federal judge to render judgment on issues involving the FLSA, and, moreover, may not even have the contractual authority to apply the FLSA to the dispute.

In a dissenting opinion entered by Chief Justice Burger, with whom Justice Rehnquist joined, the minority strongly opposed both the conclusion and the reasoning of the majority opinion. Chief Justice Burger agreed with the majority opinion that the FLSA cannot be waived by an agreement. However, as to the consequences of the majority opinion he states:

> [I]t is a different — indeed, a totally different — proposition to say that employees and employers may not agree to a means of enforcing the employees' routine wage claims outside the costly, cumbersome judicial process of the federal courts.

(*Barrentine*, *supra*, at 746).

Chief Justice Burger further stated that,

> It is a hornbook law, however, that there is a strong congressional policy favoring grievance procedures and arbitration as a method of resolving labor disputes . . .

(*Barrentine*, *supra*, at 747).

The dissenting opinion rejects the reasoning of the majority as to the competency of an arbitrator to adjudicate questions under the FLSA:

> . . . The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that usually arise in shops and factories.

(*Barrentine, supra*, at 747).

The dissenting opinion further opposes the majority's reasoning as to the ability of the union to pursue its employees' individual rights:

> [t]he union and the employee are the traditional allies, united in enforcing wage claims of employees individually as collectively.

(*Barrentine, supra*, at 750).

B. The Court of Appeals Erred in Applying the Doctrine of *Barrentine* to This Case.

Petitioner's case is distinguished in two important aspects from the *Barrentine* case.

First, and most significantly, unlike in *Barrentine*, in this case Petitioner did not even attempt to pursue arbitration in accordance to the CBA. Instead, he completely disregarded the arbitration clause and filed a complaint in a federal court.

In *Barrentine* the sequence of events was different. The workers filed a complaint in federal court *after* attempting to arbitrate their case, and *after* being rejected by the arbitrator with no explanation.[6]

Expanding the opinion in *Barrentine* to include this case,

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6. In fact, the Court in *Barrentine* adopted the opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, L. Ed. 2d 147, 94 S. Ct. 1011 (1974), in which the facts were similar to *Barrentine* in that the employee in *Alexander* has attempted prior to filing a complaint in court, to resolve his claims through the collective-bargaining agreement.

would undermine completely the arbitration and grievance clause in the CBA, and moreover, it will encourage employees to ignore their unions and the collective bargaining agreements, and to file their individual claims in federal courts instead. The union will be thus transformed from an organization responsible to the welfare of the employees both individually and collectively, to a much smaller entity whose authority may be manifested only with regard to collective issues.

The doctrine of *Barrentine*, thus, should apply only to employees who previously attempted to resolve their problems through the grievance and arbitration procedure, and should not apply when the employee did not even attempt to seek the assistance of its union in an arbitration proceeding.[7]

Second, it seems that the decision of the Court in *Barrentine* was also based on the specific language of the *Barrentine* arbitration clause.[8] The language of the *Barrentine* arbitration clause seems to be designed to a collective dispute rather than to

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7. Such consequences would go even beyond the intention of Justice Brennan in *Barrentine* who stated in his opinion that "an arbitrator may be competent to resolve many preliminary factual questions" (*Barrentine*, *supra*, at 742).

8. The language of the grievance and arbitration procedure under the *Barrentine* collective bargaining agreement provides, in pertinent part, as follows:

> The Unions and employers agree that there shall be no strikes, tieups, or legal proceedings without first using all possible means of settlement as provided for in this Agreement . . . Failing adjustment by these parties, the following procedures shall apply . . .

(*See Barrentine*, *supra*, footnote number 5).

an individual dispute, as it specifically refers to "strikes, lockouts, tieups or legal proceedings", all of which are clearly collective actions.

However, in this case, the language of the grievance and arbitration clause is much broader, and includes any and all disputes, including those which do not arise from the CBA:

> All complaints, disputes or grievances arising between the parties hereto involving questions or interpretation or application of any clause of this Agreement, *or any act [,] conduct or relations between the parties, directly or indirectly* . . . shall be referred to a permanent umpire . . .

(Emphasis added) (*see* Petitioner's Appendix at A19).

Thus, the significant difference between the language of the arbitration clauses also leads to the conclusion that the doctrine of *Barrentine* cannot apply to this case.[9]

Indeed, as will be detailed below, the doctrine set forth in *Barrentine*, that claims arising under federal law are not arbitrable, has been much narrowed, and perhaps even abolished, in subsequent opinions of this Court.

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9. Similarly, in *Iowa Beef Packers v. Thompson*, 405 U.S. 228, 31 L. Ed. 2d 165, 92 S. Ct. 859 (1972), this Court addressed the question whether employees may institute a FLSA action in court against their employer, without first exhausting the grievance and arbitration procedure. This Court determined that the employees could have pursued a court claim because at oral argument in Court it developed that the grievance and arbitration procedure of the collective bargaining agreement applied only to grievances "pertaining to a violation of the Agreement" and not to all disputes and grievances.

C. Subsequent Opinions by This Court Have Narrowed, and Perhaps Even Abolished the Doctrine Set Forth in *Barrentine*.

Two subsequent opinions of the Supreme Court divert significantly from the basic premises set forth in *Barrentine*.

The first of those cases is *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). In this case the Court held that claims arising under the Sherman Act (15 U.S.C.A. § 1 *et seq.*) and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction are arbitrable pursuant to the federal Arbitration Act.[10] Furthermore, the Court stressed that arbitration clauses should be binding and that "complexity should not suffice to ward off arbitration" (*Mitsubishi, supra*, at 633).

It is significant to notice *Mitsubishi*'s dissenting opinion. This opinion, which was, not surprisingly joined by Justice Brennan who delivered the *Barrentine* majority opinion, stated, as in *Barrentine*, that a distinction should be made between statutory rights and contractual rights and that the former should not be subject to arbitration clauses. The dissenting opinion relied, in support of its assertion, on the previous opinions of *Barrentine*, and *Gardner-Denver, supra*.

The second case is *Shearson/American Express, Inc. v. Mcmahon*, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987). Here the Supreme Court, following its decision in *Mitsubishi*, ruled that claims under the Securities Exchange Act

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10. "The *Mitsubishi* Court's rejection of the rule of nonarbitrability of statutory claims is stated in a portion of its opinion that is not confined to the context of international arbitration. Thus, *Mitsubishi* would appear to limit the effect of *McDonald, Barrentine*, and *Gardner-Denver*" *See Jacobson v. Merrill Lynch*, 797 F.2d 1197 (3rd Cir. 1986).

and RICO were arbitrable. Moreover, the Court, quoting *Mitsubishi*, states that " 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act" (*Shearson*, at 226).

In *Steele v. L.F. Rothschild & Co., Inc.*, 701 F. Supp. 407 (S.D.N.Y. 1988), a case in which the court was specifically concerned with an individual employee's claim under the FLSA, the court, referring to the *Shearson* decision with regard to the capability of arbitrators, stated that,

> The second [rationale of *Barrentine*] has been effectively discarded as *ratio decidendi* . . . , concluding that arbitral tribunals are readily capable of handling factual and legal complexities, do not restrict substantive rights, and may be expected to follow the law.

D. Public Policy Endorses the Enforcement of Valid Arbitration Clauses in Routine Labor Disputes.

The consequences of the decision of the Court of Appeals in this case may be detrimental to some of this country's most important policies and values. An employee will now have the option to disregard binding arbitration clauses, and select the forum to which she shall bring her claims against her employer. This situation will lead to unnecessary and redundant litigation, and additional cost to the federal government.

The argument stating that arbitrators are not as competent as judges, which is one of the leading arguments in the *Barrentine* opinion, is not without doubt. It is opposed by the dissenting opinion of Chief Justice Burger, who states that in this specific labor dispute "judges are less adapted to the nuances of the

disputes that typically arise in shops and factories." As mentioned above, in *Mitsubishi* and *Shearson* the Court withheld the opinion of Chief Justice Burger regarding the competency of arbitrators.

Moreover, several authorities indicate that it is a national labor policy to encourage the negotiation of terms and conditions of employment through the collective bargaining process, and to settle labor disputes through arbitration. *See Barrentine*, at 734; *United Paperworkers v. Misco*, 484 U.S. 29 (1987); National Labor Relations Act of 1935, 29 U.S.C. §§ 151 *et seq.*; Labor Management Relations Act, 1947, 29 U.S.C §§ 141 *et seq.*; *Steelworkers v. Warior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 458-459 (1957); *see also*, *NLRB v. Allis-Chalmers MFG. Co.*, 388 U.S. 175, 180, 18 L. Ed. 2d 1123, 87 S. Ct. 2001 (1967). Even the FLSA adheres to this policy. 29 U.S.C. § 173(d) provides that:

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Thus, it was held that a court must always look at any question relating to arbitrability of a labor dispute from fundamental point of view laid down in 29 U.S.C. § 173(d) subsection (d). *Standard Motor Freight, Inc. v. Local Union No. 560*, 228 A.2d 329 (1967).

Moreover, the second reasoning of *Barrentine* which provides that the union is not always likely to represent the individual employee, was also questioned by the courts. Although it is true that conflict of interest may arise between

individual employees and their unions, it was held that "the union and the employee are the traditional allies, united in enforcing wage claims of employees individually as well as collectively" (*Barrentine*, dissenting opinion, at 750); *see also*, *Satterwhite v. United Parcel Service, Inc.*, 496 F.2d 448, 451 (1974) ("[o]ne of the highest objectives of any union is to get all the money possible for all of its members").

Finally, it was held that when grievance disputes proceed to arbitration provided for in collective bargaining agreements, the union has the obligation to fairly represent interests of the employees. Thus, if the union breaches its duty, then the finality rule regarding arbitration decisions is lifted, and so is the bar to federal court review. *Smith v. Babcock & Wilcox Co.*, 726 F.2d 1562 (1984).

CONCLUSION

WHEREFORE, for all of the foregoing reasons and in the interest of justice it is respectfully prayed that the conditional cross-petition for writ of certiorari be granted.

Respectfully submitted,

ALAN H. LICHTENBERG
Counsel of Record
URI SELLA
LICHTENBERG & GINACH, P.C.
Attorneys for Cross-Petitioners
90 Park Avenue
New York, New York 10016
(212) 867-7900